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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1969

No. 1445

THE FIRST NATIONAL BANK OF DECATUR,
a National Banking Corporation, Formerly,
THE NATIONAL BANK OF DECATUR,
Respondent

v.

INSURANCE COMPANY OF NORTH AMERICA,
a Corporation,
Petitioner,

ANSWER TO PETITION FOR WRIT OF CERTIORARI

To The United States Court of Appeals
For The Seventh Circuit

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SCHNEPP & BARNES, PRINTERS, INC., SPRINGFIELD, ILL.

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To The Honorable, The Chief Justice And The Associate Justices Of The Supreme Court Of The United States:

The Respondent, The First National Bank of Decatur, a National Banking Corporation, formerly, The National Bank of Decatur, respectfully prays that the Petition for

Writ of Certiorari be denied to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit entered in this proceeding on March 16, 1970.

REASONS FOR DENYING THE WRIT

Rule 19 of The United States Supreme Court Rules, 28 USCA, provides that a review on Writ of Certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons therefor. The decision imminating from the Court of Appeals of the Seventh Circuit in this case is not in conflict with the decision with any other Court of Appeals on the same matter, nor does the decision involve an important State question in a way in conflict with applicable state law. Respondent submits that both the District Court and the Court of Appeals followed applicable state law, as will appear in both the decision of the District Court and of the Court of Appeals as set forth in the Appendix to the Petition.

Coverage B of the Petitioner's Bond as set forth on Page 12 of the Petition, improperly omits certain words from the coverage. These words are set forth in full in the opinion of the Court of Appeals on Page 11 of the Appendix to said Petition.

Petitioner maintains that the only perils insured against under coverage B involve physical loss of tangible property, and maintains further that no physical loss of tangible property is involved. To support its contention, Petitioner cites various cases which define property. Conspicuously absent from its Petition are the words of Bankers Blanket Bond Form No. 24, which is involved in this lawsuit. On the first page of this Bond, the word property is defined, and included in that term, among other things, the follow-

ing: acceptances, bank notes, bills of exchange, bonds, certificates, checks, currency, drafts, evidences of debts, insurance policies, assignments of insurance policies, money, mortgages, receipts, rights, and withdrawals of orders. (See Appendix 12 to Petition)

Coverage B does not in any way restrict the term "property" and in fact, page 1 of the Bond specifically states that whenever used in this Bond, property shall be deemed to mean, and then follows the various items enumerated above, together with others.

This same contention that was asserted in the case of Fidelity and Casualty Company of New York v. Bank of Altenburg, 216 F. 2d 294 and the Court disposed of the argument at page 304 as follows:

> "We are unable to agree with the argument that the bond contemplated reimbursement only in the event tangible or physical property was taken from the bank by means of false pretenses. The Bond was to cover banking operations. The losses covered were very broad. The term property was defined to include a multitude of types of assets of the bank, including money, currency, coin, securities, evidences of debts, certificates of deposit, rights, transfers, coupons, drafts, bills of exchange, acceptances, promissory notes, checks, money orders, and all other instruments similar to or in the nature of the foregoing . . . and chattels which are nor hereinbefore enumerated and for which the insured is legally liable. Applying the language used in the Brazeau Bank case, Hartford Accident and Indemnity Co. v. Federal Deposit Insurance Corporation, Supra, in construing another provision of a similar Bond, it is not conceivable to us that any disinterested banker, insurance underwriter or lawyer would construe this Bond as not covering assets of the bank lost through a check kiting scheme practiced upon it."

The definition of property in the instant Bond is identical to that in the cited case.

The same question was raised in National Bank of Paulding v. Fidelity and Casualty Company, 131 F. Supp. 124, at 127, as follows:

> "A question arises as to whether or not the word property embraces the loss which the bank sustained through these transactions. Mr. Stollar obtained a credit to his account in the Plaintiffs bank which he was able to check out in the form of money. Property is defined in these Bonds to mean money."

DECATUR respectfully submits that INA has already defined the word "property" and that it clearly covers both tangible and intangible property. Had INA intended to limit the loss under clause B, it could have done so, but instead it continued to use the word property in accordance with the definition on the first page of the Bond. The cases cited by INA involving a definition of the word "property" are clearly not in point, and DECATUR calls the Court's attention to the definition of property as used in the Statute. The Statute itself reads as follows:

> "As used in this part C, 'property' means anything of value. Property includes real estate, money, commercial instruments, admission or transportation tickets, written instruments, representing or emboding rights concerning anything of value, labor, or services, or otherwise a value to the owner; things growning on, affixed to, or found on land, or part of or affixed to any building; electricity, gas and water; birds, animals, and fish, which ordinarily are kept in a state of confinement; food and drink." (Chapt. 38, Ill. Rev. Stat. Sec. 15.1)

As stated by the Court of Appeals (Appendix 13 to Petition) "it may be worthy of note that this Bond has been revised since the decision of these cases and the in-

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surer has made no effort to further restrict the definition of property."

Petitioner also claims that the loss was excluded because the transaction in reality was a loan. The Bond provides that there is no coverage for any loss resulting from the complete or partial nonpayment of or default upon any loan made by or obtained from the insured, but this exclusion is obviously a limitation of liability where a loan has been "procured," i.e., made by agreement, even though trick, artifice, fraud or false pretenses on the part of the borrower has been the primary factor in making a loan. For example, had Community falsely and fraudulently provided a balance sheet to respondent showing a large margin of unencumbered assets and obtained from respondent a loan pledging for repayment non existent for encumbered assets, the bond would exclude the resulting loss. This exclusion, instead of supporting the claim of Petitioner, actually is diametrically opposed, since it recognizes a loss under "false pretenses," would include a voluntary loan, and specifically excludes the same from the false pretenses coverage.

The testimony of the officers of Respondent and the President of Community was that a loan had been sought on behalf of Community, in connection with the assignment of accounts receivable of Community, but that Respondent had refused to extend credit other than on warehouse receipts. Since the loan sought by Community was on accounts receivable, and therefore secured, and it was refused, it is obvious that respondent would not and did not extend credit on an unsecured loan. Moreover, a loan implies a meeting of the minds; an agreement, as to amount, rate of interest, time for repayment, and security, if any. None of these elements are present.

Technically, a creditor-debtor relationship arises by implication of law from the doing of certain facts, but while this creates a "debt" it lacks the essential, voluntary, contractual elements of a loan. For example, embezzlement by a bank employee would create a debt, but it would hardly be contended that the same was a loan.

The history of Bankers Blanket Bond is best shown by the case law, and there is certain case law involving the language used in an earlier form of this same bond.

In Provident Trust Co. v. National Surety Corp., 138 F. 2d 252 (3rd Cir. Pennsylvania 1943), a bank loaned a customer Fifteen Thousand Dollars ($15,000.00) on security of warehouse receipts for 632 barrels of liquor. The warehouse receipts were in fact false, and the Plaintiff lost virtually all of the loan. At that time, the Bankers Blanket Bond covered losses from "forged or altered written instruments," and excluded, "any loss resulting from any loan made by the insured or by any of the employees whether authorized or unauthorized."

The Court held in favor of the bank, and stated that the loss was not excluded, with this language at page 253:

> "At least a confusing situation is presented, which has been caused by the scrivener insurance company. This is to be resolved against the company rather than the policyholder."

Sometime after the decision in the Provident Trust Company case, Bankers Blanket Bond Form No. 24 was revised to read:

> "Any loss as the result of the complete or partial non-payment of or default upon any loan made by or obtained from the insured, whether procured in good faith or through trick, artifice, fraud or false pretenses . . ."

This new language was tested in the case of Community Federal Savings & Loan Association v. General Casualty Co., 274 F. 2d 620 (8th Cir. 1960), which involved a savings and loan bond with the identical exclusion for loans as contained in the present bond. The Plaintiff had made large loans to a house builder in reliance upon his false representation that the houses were completed and all bills had been paid. In ruling against the savings and loan association, the Court held that although the loss was within the coverage of the bond, it was also excluded as a loan under the new language of the bond.

In Hartford Accident & Indemnity Co. v. Federal Deposit Insurance Corp., 204 F. 2d 933 (8th Cir. 1953), the insurance company's defense was based upon the claim that the bank sustained a loss by granting a loan to its depositor and that the loss from the non-payment of the checks was therefore a loss resulting from the non-payment of a loan and excluded. In rejecting this contention, the Court stated at 936:

> "The fact that Schneier was obligated to reimburse the bank because of having induced it to accept the worthless checks for credit to his account and to permit him to draw against the credit, did not, in our opinion, make the loss sustained by the bank a loss resulting from the non-payment of a loan, within the ordinary meaning of that word as applied to banking or insurance.
>
> "It is to be noted that the bond in suit covered loss of property through robbery, burglary, common law or statutory larceny, theft, false pretenses, holdup, etc. Since any one causing a loss within this coverage would necessarily become obligated to reimburse the bank, it would seem that, under the Defendant's theory, the commission of any of these offenses against the bank would, if successful, result in the offender having

procured a loan from the bank, a non-payment which caused the loss."

The Court further held at page 697:

"It is not conceivable to us that any disinterested banker, insurance underwriter or lawyer would construe the word "loan", as used in the exclusion clause of this Indemnity Bond, to cover the obligation imposed by law to reimburse a bank for money or credit obtained through the use of worthless checks.

"We think the District Court correctly concluded that the loss sustained by the Brazeau Bank was directly caused by false pretenses and was within the coverage of the bond."

This identical language was quoted with approval in Fidelity and Casualty Company of New York v. Bank of Altenburg, 216 F. 2d 294, at page 305.

In National Bank of Paulding v. Fidelity and Casualty Company, 131 F. Supp. 124, in rejecting the contention of the insurance company that a loan was involved, the Court stated at 126:

"In order to have a loan, there must be an agreement, either expressed or implied, whereby one person advances money to the other and the other agrees to repay it upon such terms as to time and rate of interest or without interest, as the parties may agree. In order to have a contract, there must be a meeting of minds."

To the same effect is United States v. Western Contracting Corporation, 341 F. 2d 293, and Indemnity Insurance Company v. Pioneer Valley Savings Bank, 343 F. 2d 634 at 652.

Petitioner cites the case of Citizens National Bank of St. Petersburg v. Travelers Indemnity Company, 296 F. Supp. 300 (M.B. FLA. 1967), but this case is of little

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help. The case simply states that the plaintiff claims it sustained a loss, which is denied by the defendant, and after detailing the claim, the Court held at 301:

> "The plaintiff has failed to establish by preponderous of the evidence that it suffered any loss by larceny or false pretenses as contemplated by the Bankers Blanket Bond and that in any event, the preponderous of the evidence establishes that any loss that could have been suffered by Citizens was as the result of the extension of credit or a loan within the meaning of exclusion (d)."

Since we do not know what evidence was presented in that case, the decision is obviously not at variance with any of the reported cases, and it is the only case reported denying recovery on any basis whatever. The provisions of the Commercial Code do not even remotely bear upon the issues of this case. There is no question but that Community became indebted to respondent for the amount of respondent's loss, but in the same way that a thief does to an owner whose property has been stolen.

Although not raised as an issue at the trial, petitioner asserts that respondent's conduct precludes "good faith" and that as such, the claim is defeated. This defense was not pleaded or raised during the trial, and respondent respectfully submits that there is no evidence to support the same.

Petitioner states that Community was not guilty of obtaining money by false pretenses within the meaning of the Bond, because there was not a specific intent to cheat and defraud respondent. Both the District Court and the Court of Appeals followed the law of the State of Illinois and specifically Section 17-1 of the Criminal Code of Illinois (App. 5 & 18 of Petition).

False pretenses have been defined in criminal cases in

Illinois, as exemplified by People v. Martin, 372 Ill. 484, at 486, as follows:

> "Broadly speaking, any designed misrepresentation of an existing condition by which a party obtains goods of another, is a false pretense under the statute making it a crime to obtain property by false pretenses."

In Illinois Law and Practice, Volume 19, Page 408, False Pretenses, Section 2, it is said:

> "A 'false pretense' is such a fraudulent representation of an existing or past fact, by one who knows it not to be true, as is adapted to induce the person to whom it is made to part with something of value. More briefly, it may be defined as any designed misrepresentation of a past or existing fact or condition by which another is induced to part with his property."

The Petitioner states that a series of erroneously decided cases in the 8th Circuit were applied by Court of Appeals for the 7th Circuit in this case, but it is not only 8th Circuit Cases, but also National Bank of Paulding v. Fidelity and Casualty Company, 131 F. Supp. 121 (S. D. Ohio, 1954); Aetna Casualty and Surety Company v. Guaranty Bank and Trust Company, 370 F. 2d 276 (First Cir. 1966); United Pacific Insurance Co. v. Idaho First National Bank, 378 F. 2d 62 (9th Cir. 1967), and St. Lawrence County National Bank of Canton v. American Motorists Insurance Company, 249 N.Y. Supp. 2d 543 (1964), which have identical holdings on similar facts to the 8th Cir. cases and also to the decision of the Court of Appeals for the Seventh Circuit in this case.

Petitioner also relies upon the testimony of an expert employed by the American Surety Association, in order to show that the insurance contract was the joint product of Petitioner and Respondent. The fact that respondent

belonged to the American Bankers Association was and is insufficient to charge respondent with an active part in drafting the bond in question. This expert agreed that so far as banks were concerned they were not a member to any agreement until the form had been finalized and an insurance company had issued the bond or policy. The documentary evidence indicated that under the law of various states the bond did not cover obtaining money or property by false pretenses, and the surety committee suggested that the term "false pretenses", be inserted in the bond partly on the basis of competing with Lloyds and St. Paul Mercury Indemnity Company, "who have effectively emphasized the absence of this coverage and standardized forms." Standardized form No. 8 was then revised by attaching thereto a rider amending the Bond and increasing the coverage.

This expert also testified under cross examination that he was familiar with Bankers Blanket Bond No. 24 and had been for many years, and that he had been familiar with the decisions on this particular bond since at least 1953. Bankers Blanket Bond Form No. 24 was last revised in 1961, and it contained the identical language that had been theretofore interpreted to include coverage under facts similar to the instant case.

This Bankers Blanket Bond Form No. 24 was issued by Petitioner to Respondent in 1965, covering losses suffered by Respondent up to Nine Hundred Thousand Dollars ($900,000.00) and without any question, with full knowledge of the previous Court decisons construing the "false pretenses" provisions of the Bond.

It is not Respondent's form but that of Petitioner. All Respondent did was to pay Petitioner the agreed premium and accept the policy.

The District Court has set forth in thirteen separate paragraphs the trial court's determination of the facts. (App. 1-4 to Petition). These facts are amply supported by the evidence, and under the provisions of Rule 52 of the Federal Rules of Civil Procedure (Title 28 USCA 52), and in accordance with the statement of the Court in A.L.B. Theater Corporation v. Loew's, Inc., 178 F. 2d 495 (7th Cir. 1966), page 479:

> "The findings of fact, either directly from the uncontradicted evidence adduced, or inferentially from circumstances, or upon conflicting evidence, may not be set aside unless we are convinced they are clearly erroneous."

From the evidence in the instant case, the conclusion that Community obtained money of Respondent by false pretenses would appear both correct and inescapable. If there is any doubt as to the meaning of the word "false pretenses," in the bond, under established rules, a construction should be had to effectuate the insurance and not defeat it. Paddleford v. Fidelity & Casualty Company of New York, 100 F. 2d 606 (7th Cir. 1938).

In summary, it appears that both of the Courts below applied correct principles of Illinois Law, and that the evidence established that the transaction and losses complained of were within the coverage of the bond. Because of the decision of the Court of Appeals for the 7th Cir. is in accord with all other decisions of other Courts of Appeal, and because the decision in no way has decided an important state question in a way in conflict with applicable state law, this Court should deny the Petition for a Writ of Certiorari.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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